

Letter of Findings: 09-0028
Sales and Use Tax
For the Years 2005, 2006, 2007

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-8-8; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Gross Income Tax Div. v. National Bank & Trust Co., 79 N.E.2d 651 (Ind. 1948).

Taxpayer protests the imposition of sales tax on some items.

II. Use Tax – Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5-8; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Gross Income Tax Div. v. National Bank & Trust Co., 79 N.E.2d 651 (Ind. 1948).

Taxpayer protests the imposition of use tax on some items.

III. Tax Administration – Ten Percent Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

STATEMENT OF FACTS

Taxpayer is a retailer that sells and installs 5th wheel hitches, nerf bars, fuel tank heaters, custom exhaust systems, electrical systems and accessories for dually trucks. Taxpayer also performs brake and trailer repairs and Department of Transportation inspections. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2005, 2006, and 2007. The Department projected additional sales that were subject to sales tax, as well as additional purchases that were subject to use tax. The Department therefore assessed additional sales and use tax, penalty, and interest. Taxpayer protested some of the items upon which the Department had assessed additional tax. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition.

DISCUSSION

A review of Taxpayer's records for the years in question indicated that Taxpayer failed to collect sales tax on some of its sales to Indiana residents.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a). The person who acquires property in a retail transaction is liable for the tax on the transaction and, unless exempt, shall pay the tax to the retail merchant. The retail merchant shall collect the tax as agent for the state. IC § 6-2.5-2-1(b). If the Department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the Department. IC § 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the Department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC § 6-8.1-5-4(a). A person must allow inspection of the books and records and returns by the Department or its authorized agents at all reasonable times. IC § 6-8.1-5-4 (c).

There are a number of statutory exemptions from sales tax; however, all exemptions must be strictly construed against the party claiming the exemption. Gross Income Tax Div. v. National Bank & Trust Co., 79 N.E.2d 651, 654 (Ind. 1948). Therefore, unless Taxpayer can show that it disposed of the property subject to exemption as evidenced by an exemption certificate, Taxpayer's sales will be subject to sales tax. IC § 6-2.5-8-8.

IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

- (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
- (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

Taxpayer reviewed the Department's audit summary and, as requested by the Department at hearing, marked the protested items with either an "R" designation (to signify exemption request for sales to a retailer for resale) or a "T" designation (to signify exemption request for sales to interstate carriers). However, Taxpayer was unable to provide any supporting documentation, such as exemption certificates, in support of its contention that these sales were as Taxpayer describes. Therefore, Taxpayer has not met its burden of proof necessary to show that these protested sales were not subject to sales tax. IC § 6-2.5-2-1.

FINDING

Taxpayer's protest is respectfully denied.

II. Use Tax – Imposition.

DISCUSSION

The same review of Taxpayer's records for 2005 and 2006 indicated that Taxpayer failed to pay sales tax on some of its purchases, therefore additional purchases subject to use tax were projected for the years in question.

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-3-2(a) provides:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

An exemption from use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also a number of statutory exemptions from the use tax, including a resale exemption per IC § 6-2.5-5-8(b). All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Div. v. National Bank & Trust Co.*, 79 N.E.2d 651, 654 (Ind. 1948).

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). As stated in the previous section, Taxpayer is required to maintain its books and records in such a fashion that the Department is able to assess Taxpayer's tax obligations. IC § 6-8.1-5-4(a).

First, Taxpayer points to some items mistakenly classified as "advertising" when they should have been "office supplies" and therefore, according to Taxpayer, not taxable. Whether or not these items were misclassified, Taxpayer's argument that "office supplies" are exempt from sales tax is mistaken. There is no such sales tax exemption. Taxpayer may be confusing this with the deductibility of business expenses in its income tax calculations.

Second, Taxpayer argues that items classified as "maintenance" should be exempt as transactions involving "service" rather than "tangible personal property." Taxpayer points out that the Department's audit included this category in its projection of use tax owed because the Department's auditor found that Taxpayer had misclassified some invoices that were for "office supplies" as "maintenance" charges. The result of this misclassification was that taxable items were listed in a non-taxable "maintenance" category thus rendering, at audit, all the items in the "maintenance" category suspect. Taxpayer is correct that "services" are not subject to sales or use tax. IC § 6-2.5-4-1(b),(e). However, because Taxpayer had, by its own admission, misclassified some taxable items under the exempt "maintenance" category, it was then Taxpayer's burden to show which maintenance charges were indeed strictly for maintenance. Taxpayer failed to provide supporting documentation, therefore, the Department's audit conclusions stand with respect to these items.

Lastly, Taxpayer argued that all of the remaining purchases in question were items for resale and therefore exempt from sales and use tax, except for its purchases of Pepsi-Cola for which Taxpayer agrees it should have paid sales tax. Many of the purchases Taxpayer refers to are from auto parts retailers. Therefore it is likely that indeed Taxpayer purchased these items for resale and are therefore eligible for exemption. IC § 6-2.5-5-8(b). However, without supporting documentation, the Department cannot make that determination.

Therefore, Taxpayer has not sustained its burden to show that it is exempt from sales tax on all the above protested items.

FINDING

Taxpayer's protest is respectfully denied.

III. Tax Administration – Ten Percent Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence

penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

As stated previously, Taxpayer is required to maintain its books and records in such a fashion that the Department is able to assess Taxpayer's tax obligations. IC § 6-8.1-5-4(a). Taxpayer did not do so and therefore falls squarely within the realm of the negligence penalty. Taxpayer has not affirmatively established, as required by [45 IAC 15-11-2\(c\)](#), that its actions were due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer is denied on its protest of the assessment of additional sales tax and use tax, as well as its protest of the negligence penalty.

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